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Mr. Justice Minton-Hoosier Justice on the Supreme Court (Pt. 2)

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MR. JUSTICE MINTON—HOOSIER JUSTICE ON THE SUPREME COURT†

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V. ILLUSTRATIVE PROBLEMS OF FEDERAL STATUTORY INTERPRETATION

As every lawyer knows, it is extremely difficult to draft any document, the meaning of which is crystal clear with respect to every situation to which it may apply at some time in the future. Particularly in light of the sometimes hectic conditions under which federal legislation is considered and adopted, it is not surprising that ambiguities arise in the volumes of federal statutes, interpretation of which consumes a substantial portion of the Court's time.

A. CONSTRUCTION OF FEDERAL STATUTES LIMITING INDIVIDUAL FREEDOM

1. *Construction of Criminal Statutes.* Illustrative of Justice Minton's approach to problems of statutory construction is his opinion sustaining a conviction for interstate transportation of obscene phonograph records[327] under a statute prohibiting such shipment of "any obscene . . . book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character."[328] Justice Minton rejected the defendant's contention, adopted by the court below, that "other matter" should be limited to "objects comprehensible by sight only"[329] since all the objects specifically listed were so limited. "We are aware that this is a criminal statute and must be strictly construed. This means that no offense may be created except by the words of Congress used in their usual and ordinary sense."[330] But "statutes are construed in their entire context. This is a comprehensive statute, which should not be constricted by a mechanical rule of construction. We find nothing in the statute or its history to indicate that Congress intended to limit the applicable portion of the statute to such indecent matter as is comprehended through the sense of sight."[331] The dissent urged that the statute was not "suffici-

† This is the second of two parts. The first part appeared at 34 IND. L.J. 145 (1959).

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327. United States v. Alpers, 338 U.S. 680 (1950).

328. 18 U.S.C. § 1462 (1952).

329. United States v. Alpers, 338 U.S. 680, 682 (1950).

330. *Id.* at 681.

331. *Id.* at 684.

ently clear to apprise people"[332] that it encompassed phonograph records. More interesting, however, is the dissent's protest against censorship and its conclusion that the Court's decision "cannot be based" on the "tremendous difference between cultural treasures and the [admittedly obscene] phonograph records here involved."[333] Following Justice Minton's retirement, a majority of the Court sustained the constitutionality of such legislation on the ground that however preferred the position of free speech, the Constitution does not render government impotent to suppress pornography.[334]

In another case[335] the Court held that interstate transportation of two women at the same time for immoral purposes constituted only one violation of the Mann Act's prohibition of such transportation "of any woman or girl."[336] The basis for the Court's decision was that "the ambiguity should be resolved in favor of lenity. . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."[337] Justice Minton dissented on the ground that "the statute does not seem ambiguous to me."[338] To him "any" meant "any" since "Congress had as its purpose the protection of the individual woman or girl from exploitation, and the transportation of each female was to be punished."[339]

Similarly, Justice Minton wrote the Court's opinion[340] holding that false statements to Treasury agents made to conceal an earlier false tax return violated a provision of the Internal Revenue Code which "in addition to other penalties provided by law" proscribed attempts to evade taxes "in any manner."[341] He reached that result even though false statements to administrative agencies are also punishable under another statute,[342] saying, "At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute."[343] Even this careful qualification concerning different proof proved unnecessary when, following Justice Minton's retirement, the

332. *Id.* at 685 (dissenting opinion).
333. *Id.* at 687 (dissenting opinion).
334. Roth v. United States, 354 U.S. 476 (1957); see also Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); *cf.* Butler v. Michigan, 352 U.S. 380 (1957); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
335. Bell v. United States, 349 U.S. 81 (1955).
336. 18 U.S.C. § 2421 (1952).
337. Bell v. United States, 349 U.S. 81, 83 (1955).
338. *Id.* at 84 (dissenting opinion).
339. *Ibid.*
340. United States v. Beacon Brass Co., Inc., 344 U.S. 43 (1952).
341. INT. REV. CODE OF 1939, § 145(b); see INT. REV. CODE OF 1954, § 7201.
342. 18 U.S.C. § 1001 (1952).
343. United States v. Beacon Brass Co., Inc., 344 U.S. 43, 45 (1952).

Court held that even where the proof required under two different criminal statutes is the same, the trial court need not instruct the jury with respect to the crime bearing the lesser punishment.[344] This latter decision may help cast in its proper light the scholarship supporting Justice Douglas' statement in *Rosenberg v. United States* that "it is law too elemental for citation of authority that where two penal statutes may apply—one carrying death, the other imprisonment—the court has no choice but to impose the less harsh sentence."[345]

However, "any" was not always all-inclusive for Justice Minton. For example, where a statute punishing theft of "mail or any article or thing" was amended to apply to "any article or thing,"[346] Justice Minton joined a dissent which urged that the statute as amended did not apply to mail.[347] He joined in another decision that a course of conduct is the unit of crime for violations of the Fair Labor Standards Act,[348] so that payment of below-standard wages does not constitute a separate crime for each employee underpaid each week.[349] In another case he joined in dissenting from a decision sustaining a conviction for the sale of a nonexistent public office[350] on the ground that "any appointive office or place under the United States"[351] applies only to actual and existing offices.

Justice Minton himself wrote the Court's opinion upsetting a conviction for mailing matters "concerning any lottery"[352] on the ground that the statute, being penal, "must be strictly construed,"[353] and as so interpreted, did not apply to matters merely suggesting a lottery. Along somewhat the same line was his dissent from the sustaining of a conviction for using the mails to defraud as applied to a co-defendant who was unaware of the use of the mails.[354] To Justice Minton "this is simply guessing Braden into the federal penitentiary. It may be good guessing, but it is not proof."[355]

Another example of Justice Minton's approach to these interpretive problems is found in a series of decisions concerning the application of the Wartime Suspension of Limitations Act which provided that in

344. Berra v. United States, 351 U.S. 131 (1956).
345. 346 U.S. 273, 312 (1953) (dissenting opinion).
346. 18 U.S.C. § 1708 (1952).
347. Tinder v. United States, 345 U.S. 565 (1953).
348. 52 Stat. 1068-69 (1938), as amended, 63 Stat. 919, 29 U.S.C. §§ 215, 216(a) (1952).
349. United States v. Universal CIT Credit Corp., 344 U.S. 218 (1952).
350. United States v. Hood, 343 U.S. 148 (1952).
351. 18 U.S.C. § 215 (1952).
352. 35 Stat. 1129-30 (1909); see 18 U.S.C. § 1302 (Supp. V, 1958).
353. United States v. Halseth, 342 U.S. 277, 280 (1952).
354. Pereira v. United States, 347 U.S. 1 (1954).
355. *Id.* at 15 (dissenting opinion).

actions involving fraud, "the running of any existing statute of limitations . . . shall be suspended until three years after the termination of hostilities."[356] Justice Minton joined in one decision holding that this statute applied to crimes involving fraud, whether or not denominated as such.[357] In a companion case he joined in dissenting from the Court's decision that it applied only to "pecuniary" frauds.[358] He himself wrote the dissent in a 5-4 decision in which the Court held that the Suspension Act did not apply at all to offenses committed after the declaration of the end of the war.[359] In both of these dissents Justice Minton opposed an interpretation of the Suspension Act which limited its application by adding a qualification not found in the express language of the statute itself.

His votes in all these cases demonstrate no particular inclination in favor of or against the defendants' claims, while his opinions indicate several other factors which did influence his decisions. First, in the absence of an ambiguity in the language of the statute, he was reluctant to depart from a literal interpretation of that language. Second, while he conceded that criminal statutes should be strictly construed in favor of the defendant, he would not depart from the literal language where he saw no ambiguity. Finally, more than many of the Justices, he relied on analogous decisions of the Court, even though they were from another era or of another "vintage."[360]

2. *Construction of Statutes Relating to Aliens.* The scope of the substantive power which the federal government has and exercises over aliens is illustrated by decisions in which Justice Minton joined holding that an alien may be deported for Communist Party membership which terminated prior to enactment of the statute expressly making such membership grounds for deportation.[361] Moreover, the property of enemy aliens can be seized, in Justice Minton's words, even in the absence of "proof of actual use of the property for economic warfare against the United States. The crucial fact is not the actual use by an enemy-tainted corporation of its power in economic warfare against the United States. It is the existence of that power that is controlling and against which the Government of the United States may move. The Govern-

356. 18 U.S.C. § 3287 (1952).
357. United States v. Grainger, 346 U.S. 235 (1953).
358. Bridges v. United States, 346 U.S. 209 (1953).
359. United States v. Smith, 342 U.S. 225 (1952).
360. See Mitchell v. C.W. Vollmer & Co., 349 U.S. 427, 434 (1954) (dissenting opinion).
361. Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1950).

ment does not have to wait for the enemy to do its worst before it acts."[362]

Even procedural protections were denied to entering aliens in view of Justice Minton's conclusion in *United States ex rel. Knauff v. Shaughnessy* that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[363] In that case the question was whether or not an alien war bride could be excluded without a hearing where the general security statutes authorized such action but the War Brides Act provided for admission of war brides "otherwise admissible under the immigration laws" without regard to quotas or physical and mental requirements.[364] Having determined that there was no constitutional objection to exclusion without a hearing, Justice Minton concluded that even an alien war bride is subject to the security statutes since she must be "otherwise admissible" to secure entry under the War Brides Act.

The dissenters in the *Knauff* case did not challenge the power of Congress to exclude an entering alien without a hearing, but rather urged that, as in criminal cases, all doubts should be resolved in favor of the alien, particularly in view of the general policy embodied in the War Brides Act of relaxing restrictions with respect to alien spouses of veterans. Justices Frankfurter, Black and Jackson, the dissenters in the *Knauff* case, relied on the same ground of resolving doubts in favor of the alien in dissenting from another decision in which Justice Minton joined[365] holding that a denaturalized citizen convicted of espionage while a citizen could be deported under a statute providing for deportation of aliens convicted of espionage.[366] Similarly, Justice Frankfurter (who wrote the Court's opinion, in which Justice Minton joined, sustaining the deportation of an alien for past Communist Party membership)[367] wrote the opinion in a case following Justice Minton's retirement reversing a deportation order on the ground that there was no showing that the alien's Party membership was "meaningful," a requirement not expressly set forth in the statute.[368]

Justice Minton himself wrote the Court's opinion holding that a Swiss alien did not waive his right to become a citizen by claiming exemption from the draft, even though a statute so provided, where both the State Department and the Swiss Legation had advised him errone-

362. Uebersee Finanz-Korporation, A.G. v. McGrath, 343 U.S. 205, 212 (1952).
363. 338 U.S. 537, 544 (1950).
364. 59 Stat. 659 (1945).
365. United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950).
366. 41 Stat. 573 (1920); see 66 Stat. 204 (1952), 8 U.S.C. § 1251(a)(17) (1952).
367. Galvan v. Press, 347 U.S. 522 (1954); *cf.* Lehman v. United States *ex rel.* Carson, 353 U.S. 685 (1957); Marcello v. Bonds, 349 U.S. 302 (1955).
368. Rowoldt v. Perfetto, 355 U.S. 115 (1957).

ously that, by virtue of a treaty between the United States and Switzerland, he would not lose the right to apply for citizenship.[369] "Petitioner did not knowingly and intentionally waive his rights to citizenship. . . . Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. . . . To hold otherwise would be to entrap petitioner."[370]

That Justice Minton was not so sympathetic with less desirable aliens is revealed by his dissent from the Court's decision that coming into the United States from the Philippines while the latter was a United States' possession was not an "entry" into the United States,[371] so that an alien so doing was not deportable for his subsequent crimes under a statute authorizing deportation for crimes "committed at any time after entry."[372] The majority reasoned that "although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile,' . . . and should be strictly construed."[373] Justice Minton protested forthrightly against the policy underlying this approach to this question of statutory interpretation, saying:

> The effect of the Court's opinion is to construe the Act strictly in favor of the convicted criminal sought to be deported for his criminal acts, rather than in favor of the United States in protection of its citizens. I know of no good reason why we should by strained construction of an Act compel the United States to cling onto alien criminals. It is not the public policy of this country to construe its statutes strictly in favor of alien criminals whose convictions have already been established of record. Why should we give a strained construction to the word 'entry' in the instant case? The least we should do is to give the word "entry" its ordinary meaning.[374]

His votes in these cases relating to aliens follow a pattern similar to his votes in criminal cases. He adhered to a literal interpretation of such statutes and refused to depart from it to avoid seemingly harsh results. Moreover, the last case quoted above illustrates that he considered the protection of citizens from criminals just as important as the claimed rights of admitted criminals, a view consistent with his general approach

369. Moser v. United States, 341 U.S. 41 (1951).
370. *Id.* at 47.
371. Barber v. Gonzales, 347 U.S. 637 (1954); *cf.* Rabang v. Boyd, 353 U.S. 427 (1957).
372. 39 Stat. 889 (1917), as amended, 54 Stat. 671 (1940), 56 Stat. 1044 (1942), 62 Stat. 1206 (1948).
373. Barber v. Gonzales, 347 U.S. 637, 642-43 (1954).
374. *Id.* at 643 (dissenting opinion).

to many of the procedural problems in the administration of criminal justice.[375]

B. INTERPRETATION OF FEDERAL STATUTES REGULATING COMMERCE

1. *Federal Compensation Acts.* Congress has enacted a number of statutes designed to afford compensation to injured employees. The right to and amount of recovery differs in each. Sometimes Congress expressly provided that a particular remedy should be exclusive where it applies, and in other instances the coverage of two acts appears to overlap, while many other employees are not covered by any federal act. Borderline cases in situations such as these presented the Court with a number of difficult interpretive problems. For example, Justice Minton joined in one decision[376] holding that a man doing off-season on-shore repair work is not a "seaman" covered by the Jones Act[377] (and reserving decision as to the applicability of the Longshoremen's and Harbor Workers' Compensation Act).[378] He joined in dissenting from another decision holding that the Federal Employees' Compensation Act[379] is the exclusive remedy for government employees, even though it did not expressly so provide and the literal language of the Public Vessels Act[380] also covered the particular claimant.[381] Justice Minton's votes in these two cases are consistent with his usual literal interpretation of statutory language whether, as in the latter case, it would benefit the claimant, or, as in the former case, it resulted in denial of his claim.

He purported to follow the same formula in writing the dissent from a 5-4 decision[382] holding that a railroad brakeman injured on navigable waters is covered by the Longshoremen's and Harbor Worker's Compensation Act and, because that Act is by its terms exclusive, not by the Federal Employers' Liability Act.[383] Although the Compensation Act applies to injuries upon navigable waters if the employer has "any . . . employees . . . employed in maritime employment,"[384] and it was clear that the defendant railroad did have some employees so engaged, Justice Minton assumed that "there is but one question here and that is whether this respondent was engaged in 'maritime employment' at the

375. See, *e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950).
376. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952).
377. 38 Stat. 1185 (1915), as amended, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).
378. 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1952).
379. 39 Stat. 742 (1916), 5 U.S.C. §§ 751-801 (1952).
380. 43 Stat. 1112 (1925), 46 U.S.C. §§ 781-99 (1952).
381. Johansen v. United States, 343 U.S. 427 (1952).
382. Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953).
383. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952).
384. 44 Stat. 1424 (1927), as amended, 33 U.S.C. § 902(4) (1952).

time of his injury."[385] His answer to this question, that a railroad brakeman on a car float is engaged in railroad employment and not maritime employment, seems correct, but this was not the question presented by the case and answered by a majority of the Court.

In another case Justice Minton wrote the opinion of the Court holding that where the Longshoremen's and Harbor Workers' Compensation Act required claims to be "filed within one year after the injury,"[386] claims were barred if not filed within a year after the injury even though compensable disability from the injury did not arise until later.[387] The reasoning of his opinion once again reveals the considerations which influenced him in deciding these interpretive problems:

> We are not free, under the guise of construction, to amend the statute by inserting therein before the word "injury" the word "compensable" so as to make "injury" read as if it were "disability." Congress knew the difference between "disability" and "injury" and used the words advisedly. . . . Congress meant what it said when it limited recovery to one year from date of injury, and "injury" does not mean "disability."
>
> We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us.[388]

2. *Construction of Statutes Regulating Labor Relations.* The National Labor Relations Act[389] was adopted in 1935 to promote "industrial peace" through collective bargaining by protecting employees' rights to organize and bargain collectively from employer interference. The once controversial Taft-Hartley Act[390] added prohibitions against certain union practices. The legislative battle continues, but the concern of the Court is and was to interpret as best it can the existing legislation.

385. Pennsylvania R.R. v. O'Rourke, 344 U.S. 334, 342 (1953) (dissenting opinion).
386. 44 Stat. 1432 (1927), 33 U.S.C. § 913(a) (1952).
387. Pillsbury v. United Engineering Co., 342 U.S. 197 (1952).
388. *Id.* at 199-200; *cf.* Fogarty v. United States, 340 U.S. 8 (1950).
389. 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 141-88 (1952).
390. 61 Stat. 136 (1947), 29 U.S.C. §§ 141-88 (1952).

Much of the litigation has turned on whether the discharge of a particular employee was for the purpose of discouraging union organization or for justifiable cause. The original Act, however, provided that it should not preclude an employer from entering into a closed shop contract with the union representing its employees.[391] Justice Minton wrote the opinion for the Court holding that by virtue of this provision, under a closed shop contract an employer could discharge employees who had been expelled from the union even though this admittedly interfered with the organization and bargaining rights of the employees discharged.[392] Congress could reasonably adopt this compromise since the closed shop "protects the integrity of the union and provides stability in labor relations"[393] which "was the primary objective of Congress."[394] "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute."[395] Consistently, following legislative reversal of this decision by the Taft-Hartley Act, he joined in a decision holding it an unfair labor practice to discharge a non-union employee if the probable consequence is to encourage union membership.[396]

Having determined that an employee was wrongfully discharged, the National Labor Relations Board has considerable discretion under the statute in fashioning an appropriate remedy, including awarding reinstatement and back pay. Thus, Justice Minton wrote the Court's opinion holding that the Board need not deduct state unemployment compensation benefits from a back pay award.[397] However, he subsequently dissented from the Court's opinion sustaining a change in the Board's method of computing back pay to a quarterly basis.[398] Justice Minton urged that this method of computation made the employee more than whole, contrary to the reasoning of the Court's earlier decisions that the powers conferred on the Board are remedial and not punitive. He also relied on the fact that Congress had re-enacted the applicable statutory provision with full knowledge of the Board's earlier rule. He concluded that:

> This Court having laid down this rule, the Board having consistently applied it for over twelve years, and Congress having considered and completely overhauled the Act in 1947 with-

391. 49 Stat. 452 (1935).
392. Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949).
393. *Id.* at 362.
394. *Ibid.*
395. *Id.* at 363; *cf.* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).
396. Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).
397. NLRB v. Gullett Gin Co., 340 U.S. 361 (1951).
398. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

> out changing this provision of the statute with its long interpretation, we think it has become part of the administrative practice that Congress should change if it is to be changed.[399]

An employer's obligations are not completed by refraining from interference with union organization. He must also bargain in good faith with the collective bargaining representative selected by the employees.[400] Determination of compliance with this requirement often involves resolution of factual disputes. For example, in a 6-3 decision the Court, rejecting a ruling of the Board, held that an employer does not commit an unfair labor practice by bargaining for a "management functions" clause.[401] Justice Minton wrote the dissent, not on the ground advanced by the Labor Board that bargaining for such a clause was a per se violation, but rather on the ground that in this case the employer had refused to bargain by adamantly insisting on such a clause. He urged that "an employer may not stake out an area which is a proper subject of bargaining and say, 'As to this we will not bargain.' . . . If employees' bargaining rights can be cut away so easily, they are indeed illusory."[402]

Justice Minton's opinions in these labor cases illustrate that he was more concerned with interpreting literally the policy made by Congress than with formulating desirable labor policy through judicial construction. They also suggest that he afforded little weight to an administrative interpretation of a specific statute, a view which reappears in a number of other decisions.

3. *Construction of Federal Statutes Regulating Business Competition.* If one confined his reading to the United States Reports, he might suspect that the business community, which is loudest and most lavish in its praise of a free enterprise competitive economy, actually devotes a good bit of its attention to simplifying life by eliminating or minimizing competition. On the whole Justice Minton's votes were in favor of vigorous enforcement of competition through the Sherman Act.[403] Here again, however, literal interpretation of the statute sometimes overshadowed the policy embodied in it. For example, Justice Minton joined opinions of the Court holding that such anti-competitive agreements as price-fixing and division of markets are illegal, even when made between

399. *Id.* at 356 (dissenting opinion).
400. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(5) (1952).
401. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).
402. *Id.* at 413 (dissenting opinion).
403. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952), as amended, 69 Stat. 282 (1955), 15 U.S.C. § 1 (Supp. V, 1958).

commonly controlled corporations[404] or a parent and subsidiary.[405] In two other cases he joined in decisions limiting the applicability of the proviso to the Sherman Act which under certain circumstances exempts resale price maintenance from the prohibition on price fixing.[406] In one such case the Court held that the proviso did not permit enforcement of state resale price maintenance authorization against non-signers,[407] a result soon overruled by Congressional amendment.[408] In the other the Court held it inapplicable to sales by a manufacturer to a wholesaler where the seller was also a wholesaler.[409]

On the other hand he also joined in holding that DuPont's dominant position with respect to cellophane did not make it guilty of monopolization because the relevant market included all flexible packaging materials and not just cellophane.[410] But he dissented in a somewhat similar decision in which the Court held that a newspaper's tying of morning and evening advertising was not illegal because the relevant market included both morning and evening newspaper advertising.[411] The four dissenters urged that the newspaper was illegally using its morning newspaper monopoly to extend its evening newspaper advertising.

Justice Minton himself wrote the Court's opinion upholding the legality of a patent license whereunder patent royalties were measured by the licensee's sales of unpatented articles.[412] He distinguished the "tie-in" cases on the ground that "that which is condemned as against public policy by the 'Tie-in' cases is the extension of the monopoly of the patent to create another monopoly or restraint of competition—a restraint not countenanced by the patent grant."[413] The minority contended that by measuring payment for the patent license by sales of unpatented articles "the patent owner has therefore used the patents to bludgeon his way into a partnership with this licensee."[414] But Justice Minton concluded that the agreement was not unlawful because "this royalty provision does not create another monopoly; it creates no restraint of competition beyond the legitimate grant of the patent."[415]

404. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).
405. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).
406. 50 Stat. 693 (1937).
407. Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951).
408. 69 Stat. 282 (1955), 15 U.S.C. § 1 (Supp. V, 1958).
409. United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).
410. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).
411. Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).
412. Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950).
413. *Id.* at 832.
414. *Id.* at 838 (dissenting opinion).
415. *Id.* at 833.

In interpreting a statute as unspecific as the Sherman Act, literal interpretation can take one only so far. It may support the conclusion that contracts between commonly-controlled corporations or a parent and subsidiary are subject to the Act to the same extent as agreements between unrelated parties, but it does not help in determining what agreements are in "restraint of trade or commerce." Thus, as is illustrated by the patent license case, in such a situation the attention of the Court is necessarily focused on its earlier decisions rather than on the language of the statute.

C. INTERPRETATION OF FEDERAL TAX STATUTES

1. *Taxable Income and Deductions.* Under a tax structure with a top rate of ninety-one per cent,[416] there is great pressure on the bar, accountants and a wide variety of other professional and amateur tax consultants to devise schemes for converting ordinary income into capital gain or, better yet, to postpone recognition of the gain altogether. On the whole, taxpayers fared very poorly at the hands of the Court, in most instances without as much division of opinion as prevailed in other types of cases.

Justice Minton joined opinions holding a wide variety of receipts taxable including extorted funds,[417] a symphony prize,[418] a "proprietary" stock option,[419] insider profits required to be paid over to the taxpayer corporation,[420] anti-trust triple damages,[421] and income received under a mistaken claim of right.[422] He himself wrote the Court's opinion[423] holding that a Coast Guard officer enrolled as a civil service employee was not entitled to the exemption for compensation received "for active service as a commissioned officer."[424] Conceding that the taxpayer occupied a dual military-civilian status, he concluded "that taxpayer received his compensation in a civilian status."[425] "Taxpayer's rank was for the purpose of getting the job done, and not for the purpose of receiving compensation."[426]

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416. INT. REV. CODE OF 1954, § 1.
417. Rutkin v. United States, 343 U.S. 130 (1952).
418. Robertson v. United States, 343 U.S. 711 (1952).
419. Commissioner v. Lo Bue, 351 U.S. 243 (1956).
420. General Am. Investors Co. v. Commissioner, 348 U.S. 434 (1955).
421. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).
422. Healy v. Commissioner, 345 U.S. 278 (1953); United States v. Lewis, 340 U.S. 590 (1951); *cf.* Arrowsmith v. Commissioner, 344 U.S. 6 (1952).
423. Commissioner v. Connelly, 338 U.S. 258 (1949).
424. INT. REV. CODE OF 1939, § 22(b)(13(A), as amended, 59 Stat. 571 (1945); see INT. REV. CODE OF 1954, § 112.
425. Commissioner v. Connelly, 338 U.S. 258, 261 (1949).
426. *Id.* at 262.

Taxpayers won a few skirmishes, however. For example, Justice Minton joined in one decision in which the Court held that income from the sale of timber from land held in trust for Indians is not taxable, a victory of somewhat limited application for most of us.[427] Of more general significance was the Court's unanimous decision that a corporation is not taxable on the gain from the sale of assets by its shareholders following liquidation of the corporation.[428] Justice Minton wrote the Court's opinion in another decision for the taxpayer holding that a corporation realizes no gain on the sale of its own treasury stock,[429] a result codified in the Internal Revenue Code of 1954.[430]

Taxpayers had no better success in their attempts to secure capital gains treatment. For example, Justice Minton joined in holding that dealings in grain futures gave rise to ordinary income.[431] But he wrote the dissent from a decision holding that the portion of the sales price of an orange grove attributable to unripe oranges was taxable as ordinary income.[432] The majority concluded that "the proceeds fairly attributable to the crop are derived from property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business"[433] and therefore within an exception from the capital gains treatment otherwise extended to sales of property used in the taxpayer's trade or business.[434] It pointed to a recent amendment providing for capital gains treatment for the growing crop as evidence that the prior law, under which this case was decided, had been different. Justice Minton concluded on the other hand that "the immature crop of green oranges was not property held primarily for sale to customers in the ordinary course of trade or business,"[435] because "she was in the business of raising and selling matured fruit. She was not in the business of selling . . . green fruit growing upon the tree."[436] Justice Minton put a different interpretation on the subsequent Congressional amendment. He believed that "Congress was correcting a misinterpretation of the Revenue Act by the Commissioner and the Tax Court. It was making clear what the Commissioner and the Tax Court had obfuscated. I see no reason why we should strain to uphold a tax which Congress has by recent legislation

427. Squire v. Capoeman, 351 U.S. 1 (1956).
428. United States v. Cumberland Pub. Serv. Co., 338 U.S. 451 (1950).
429. United States v. Anderson, Clayton & Co., 350 U.S. 55 (1955).
430. INT. REV. CODE OF 1954, § 1032.
431. Corn Products Refining Co. v. Commissioner, 350 U.S. 46 (1955).
432. Watson v. Commissioner, 345 U.S. 544 (1953).
433. *Id.* at 551.
434. INT. REV. CODE OF 1939, § 117(j), as amended, 65 Stat. 500 (1951); see INT. REV. CODE OF 1954, § 1231(b)(4).
435. Watson v. Commissioner, 345 U.S. 544, 557 (1953) (dissenting opinion).
436. *Id.* at 556 (dissenting opinion).

determined to be incorrect."[437] In light of the generally favorable Congressional treatment afforded to farmers, as evidenced by the subsequent amendment to the statute in question, Justice Minton's conclusion may represent a better understanding of Congressional intent than of good tax law.

2. *Priority of Federal Tax Liens.* One who gets behind with his federal taxes is likely to have other creditors as well. The Internal Revenue Code provides that any unpaid federal tax shall be a lien, (ordinarily arising on the date of assessment) upon all of the property of the taxpayer, but that the tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed"[438] in the appropriate office under state law.

Justice Minton wrote the Court's opinion holding that the existence of a state tax lien, which under state law was in the nature of a judgment, did not make the state a judgment creditor within the meaning of the federal statute.[439] The dissenters urged that a state does not have to follow a particular procedure in creating a judgment within the meaning of the federal statute, so long as under state law the state tax lien has "the normal attributes of a judgment."[440] But while Justice Minton conceded that a "state is free to give its own interpretation for the purpose of its own internal administration,"[441] he concluded that the state tax lien was not a judgment within the meaning of the federal statute because, in his words:

> A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore, a "judgment creditor" should have the same application in all the states. In this instance, we think Congress used the words "judgment creditor" in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts. We do not think Congress had in mind the action of taxing authorities who may be acting judicially as in New Hampshire and some other states, where the end result is something "in the nature of a judgment," while in other states the taxing authorities act quasi-judicially and are considered administrative bodies.[442]

437. *Id.* at 558 (dissenting opinion).
438. INT. REV. CODE OF 1954, § 3672.
439. United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953).
440. *Id.* at 367 (dissenting opinion).
441. *Id.* at 363.
442. *Id.* at 364.

Justice Minton later wrote the Court's opinion reaching the same result with respect to a South Carolina landlord's lien.[443]

The question most often presented to the Court was the relative priority of federal tax liens and competing liens which under state law arose *prior* to the federal lien. Justice Minton wrote a series of opinions in such cases, one of which related to the priority of liens for municipal real property taxes and water rents.[444] He held that in the absence of the insolvency of the debtor (when the priority of claims of the United States is governed by another statute), the federal tax lien did not take precedence over other liens which were specific and perfected before the federal lien arose. Noting that "where the debtor is not insolvent, Congress has failed to expressly provide for federal priority,"[445] he concluded "that priority of these statutory liens is determined by another principle of law, namely, 'the first in time is the first in right.' "[446]

But the requirement that to be entitled to priority, the competing lien must have been specific and perfected before the federal tax lien arose, proved to be a strict one. Justice Minton wrote the Court's opinion holding that the federal lien took precedence over a California attachment lien which under state law was "contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists."[447] Justice Minton reasoned that:

> The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to reexamination by this Court. On the other hand, if the state court itself describes the lien as inchoate, this classification is "practically conclusive." . . . Nor can the doctrine of relation back—which by the process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation. When the tax liens of the United States were recorded, Morrison did not have a judgment lien. He had a mere "caveat of a more perfect lien to come."[448]

He amplified this reasoning in a subsequent case:

443. United States v. Scovil, 348 U.S. 218 (1955); see also United States v. Vorreiter, 355 U.S. 15 (1957).
444. United States v. City of New Britain, 347 U.S. 81 (1954).
445. *Id.* at 85.
446. *Ibid.*
447. United States v. Security Trust & Sav. Bank, 340 U.S. 47, 50 (1950).
448. *Id.* at 49-50.

> Such inchoate liens may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach and cannot then be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined. Accordingly, we concluded in *Security Trust* "that the tax liens of the United States are superior to the inchoate attachment lien . . . ." In the instant case, certain of the City's tax and water-rent liens apparently attached to the specific property and became choate prior to the attachment of the federal tax liens.[449]

In two subsequent cases Justice Minton wrote the Court's opinion according priority to the federal tax lien over a Texas garnishment lien[450] and an Ohio attachment lien (which under state law was perfected at the time of attachment),[451] each of which, the Court concluded, was "for federal tax purposes an inchoate lien because, at the time the attachment issued, the fact and the amount of the lien were contingent upon the outcome of the suit for damages."[452] In several subsequent per curiam decisions,[453] the Court reached the same result with respect to mechanics' liens. The Court's denial of priority to the lien on the facts of one of these cases embodied such a strict test for perfection of the lien that two Justices protested that it violated the principle that the "first in time is the first in right."[454]

This area is unique in that Justice Minton wrote all of the Court's opinions during his tenure. Accepting the basic rule that a federal tax lien takes precedence over prior inchoate liens, his applications of it appear correct. The Court's per curiam disposition of subsequent cases seemingly more favorable to the competing lienor has led to the complaint that it is difficult for lawyers, litigants and lower courts to determine the circumstances, if any, under which a prior lien becomes sufficiently perfected to take precedence over a subsequent federal tax

449. United States v. City of New Britain, 347 U.S. 81, 86-87 (1954).
450. United States v. Liverpool & London & Globe Ins. Co., 348 U.S. 215 (1955).
451. United States v. Acri, 348 U.S. 211 (1955).
452. *Id.* at 214.
453. United States v. Hulley, 79 Sup. Ct. 117 (1958); United States v. R. F. Ball Constr. Co., 355 U.S. 587 (1958); United States v. White Bear Brewing Co., 350 U.S. 1010 (1956); United States v. Colotta, 350 U.S. 808 (1955).
454. United States v. White Bear Brewing Co., *supra* note 453, at 1011.

lien.[455] This criticism may be unjustified, since the language of Justice Minton's opinions quoted above states rather clearly that a competing lien is perfected when its amount, the identity of the lienor and the property to which it relates are established with certainty, and when its continued existence ceases to be contingent on the outcome of subsequent litigation with the debtor.

VI. CIVIL PROCEDURAL PROBLEMS

Just as in criminal cases, procedural questions often have an important impact on the ultimate outcome of civil litigation. No matter how meritorious his claim, a litigant cannot get far if the court lacks jurisdiction of his opponent or of the action. Similarly a verdict in his favor may be an expensive victory if it is set aside by the trial court or reversed on appeal. And no matter how favorably the Supreme Court might view the merits of a defeated litigant's appeal, all is lost if the Court cannot or will not hear his case. Sometimes decisions on procedural grounds may appear to overemphasize "technicalities" at the expense of justice. But the issues in such cases often involve important questions of power, not only of state and lower federal courts, but of the Supreme Court itself.

A. Migratory Divorces

A continuing source of litigation concerns the validity of migratory divorces and related questions of alimony and custody. In the typical pattern a wife leaves the matrimonial domicile for Reno, Miami or Sun Valley where, after a short "residence" period, she obtains a divorce. When some aspect of the decree becomes an issue in subsequent litigation in a second state, the question arises whether or not the second state is required to give full faith and credit[456] to the decree in the first state. This in turn often depends upon whether or not the first state had "jurisdiction."

Unlike actions for money judgments, a state's interest in the matrimonial status of its domiciliaries is sufficient to give it jurisdiction to grant a divorce affecting that status without personal jurisdiction over the defendant. But where the plaintiff's claim to domicile rests solely on a short period of temporary residence, the basis of the state's jurisdiction is questionable.

In earlier cases the Court had held that the second state need not give full faith and credit to the first state's *ex parte* divorce decree if it

455. See Brown, *Forward: Process of Law, The Supreme Court, 1957 Term*, 72 Harv. L. Rev. 77, 82-87 (1958).

456. U.S. Const. art. IV, § 1.

found that the first state lacked jurisdiction because the plaintiff was not domiciled there,[457] but that it must give full faith and credit to the decree if the defendant appeared.[458] Accordingly, Justice Minton joined in a decision remanding a Vermont decision refusing to give full faith and credit to a Florida divorce for a finding with respect to whether or not the defendant had appeared in the Florida proceedings.[459] He also joined in a decision holding that Illinois must give full faith and credit to a New York judgment refusing to recognize a Nevada *ex parte* divorce.[460] He did not participate in another decision holding that New York could not permit a collateral attack by a third person on a Florida divorce where both parties had appeared in the Florida proceedings and such an attack was not permitted under Florida law.[461]

Under these decisions one spouse can secure *ex parte* a divorce terminating the marriage relationship which is subject to attack in subsequent litigation in other states only on the ground that the court granting it lacked jurisdiction because neither spouse was domiciled there, and even this attack is foreclosed if the other party appears. But even though domicile of one of the parties is sufficient to give a state court jurisdiction to terminate the marital status of the parties, it is not necessarily sufficient to empower it to decide all related issues.[462] Justice Minton wrote the Court's opinion avoiding a decision with respect to whether or not an *ex parte* divorce decree denying alimony, obtained by the husband, must be given full faith and credit in a subsequent action brought by the wife, by holding that the first state had not ruled on alimony so that the second state was free to do so.[463] But following his retirement the Court did hold that an *ex parte* decree denying alimony is void,[464] just as a money judgment rendered without personal jurisdiction over the defendant.[465]

In *May v. Anderson*[466] the Court reached the same result with respect to custody decrees, holding void a Wisconsin decree awarding custody to the father made without personal jurisdiction over the mother, on the ground that "rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of

457. Williams v. North Carolina, 325 U.S. 226 (1945).
458. Sherrer v. Sherrer, 334 U.S. 343 (1948); see Coe v. Coe, 334 U.S. 378 (1948).
459. Cook v. Cook, 342 U.S. 126 (1951).
460. Sutton v. Leib, 342 U.S. 402 (1952).
461. Johnson v. Muelberger, 340 U.S. 581 (1951).
462. Morris, *Divisible Divorce,* 64 HARV. L. REV. 1287 (1951).
463. Armstrong v. Armstrong, 350 U.S. 568 (1956).
464. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); *cf.* Estin v. Estin, 334 U.S. 541 (1948).
465. See Pennoyer v. Neff, 95 U.S. 714 (1877).
466. 345 U.S. 528 (1953).

custody."[467] Characterizing this reasoning as a "cardiac consideration,"[468] Justice Jackson dissented, urging that the welfare of the children outweighed the mother's "rights," and that Wisconsin's interest in such welfare, where both the father and the children were domiciled there, was sufficient to give it jurisdiction.[469] Justice Minton dissented separately on the ground that the wife's pleadings in the subsequent proceeding in Ohio had failed to challenge the Wisconsin decree so that the question decided by the Court was not properly before it.[470]

Still another interesting feature of the case was the suggestion in Justice Frankfurter's concurring opinion, "interpreting" the majority opinion as holding only that Ohio was not bound by the Wisconsin decree, that the Wisconsin decree was not void, and that Ohio was free to recognize it or not.[471] A similar intermediate position was subsequently adopted by Justice Harlan in dissent with respect to an *ex parte* decree denying alimony.[472]

Justice Minton's views with respect to *ex parte* alimony and custody decrees are difficult to ascertain since in both cases in which he participated, he based his conclusion on non-constitutional grounds. His apparent desire to avoid constitutional decisions is typical of the Court as a whole over the years.[473]

B. Jurisdiction of States Over Foreign Corporations

The states have frequently sought to regulate and tax concerns which distribute their products in the state without establishing a permanent base of operations there. Usually such attempts have been attacked on the dual grounds that they violate the commerce clause and the due process clause of the fourteenth amendment. The latter constitutional provision is also often relied upon by such corporations to resist attempts by local consumers and businessmen to instigate litigation against them in local courts.

Whether a state has jurisdiction over such a foreign corporation for a particular purpose depends upon whether the contacts of the corporation with the state are sufficient to give the state power to assert such jurisdiction without being fundamentally unfair to the corporation. When a corporation distributes its products in a manner such that it can

467. *Id.* at 533.
468. *Id.* at 540 (dissenting opinion).
469. *Id.* at 536-42 (dissenting opinion).
470. *Id.* at 542-43 (dissenting opinion).
471. *Id.* at 535-36 (concurring opinion); *cf.* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).
472. Vanderbilt v. Vanderbilt, 354 U.S. 416, 428-35 (1957) (dissenting opinion).
473. See, *e.g.*, United States v. Rumely, 345 U.S. 41, 45-46 (1953).

reasonably anticipate that they will reach consumers in another state, it is arguable that it is not fundamentally unfair for that state to regulate and tax its activities and to require it to submit to litigation instituted by local citizens, at least with respect to activities and transactions which have a local impact. But because a "state may not project itself beyond its borders,"[474] "due process requires . . . that in order to submit a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[475] In a 5-4 decision in *Travelers Health Ass'n v. Virginia*[476] the Court sustained a Virginia cease and desist order against a Nebraska insurance company doing business by mail where service had been made solely by registered mail addressed to the company's Nebraska office. Justice Minton dissented urging:

> An *in personam* judgment cannot be based upon service by registered letter on a nonresident corporation or a natural person, neither of whom has ever been within the State of Virginia. . . .
>
> Service by registered mail is said by the majority to be sufficient where the corporation has "minimum contacts" with the state of the forum. How many "contacts" a corporation or person must have before being subjected to suit we are not informed. Here all of appellants' contacts with the residents of Virginia were by mail. No agent of appellant corporation has entered the State, nor has the individual appellant. The contracts were made wholly in Nebraska. Under these circumstances, I would hold that appellants were never "present" in Virginia. . . .
>
> . . . .
>
> As I understand the *International Shoe Co.* case, the minimum contacts which a corporation has in the State must be "activities of the corporation's agent within the state." There were such contacts by agents within the State in that case. Service was made, in addition to notice by registered letter, by personal service within the State upon one of those agents. Service on an agent within the jurisdiction would seem to me indispensable to a judgment against a corporation. It would seem to be an *a fortiori* proposition that judgment could not be ob-

474. McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944).
475. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
476. 339 U.S. 643 (1950).

tained against a natural person who was not available for personal service.[477]

His position was not unlike that subsequently adopted by a 5-4 majority in *Miller Brothers Co. v. Maryland*[478] striking down, on due process grounds, Maryland's attempt to require a Delaware seller to collect its use tax. Another illustration of the conflicting views appeared in a case involving a libel suit brought in Florida by a local resident against the publisher of *Look Magazine*.[479] Although Justice Minton's majority opinion was based on a question of venue, the dissent was devoted entirely to supporting the trial court's jurisdiction.

A recent case following Justice Minton's retirement again upheld the existence of state jurisdiction over foreign insurance companies doing business by mail, holding that such a company may be sued in California in an action relating to a policy which was delivered in California, when premiums were also mailed from there and the deceased lived there when he died.[480] However, a subsequent 5-4 decision reaffirmed the existence of some constitutional limits on the exercise of jurisdiction over a foreign corporation by holding invalid a Florida judgment with respect to a trust on the ground that Florida had no jurisdiction over the Delaware corporate trustee.[481]

The Court's decisions sustaining jurisdiction over foreign insurance companies emphasize not so much the states' contacts with the corporation as the local activities of the policyholders and the states' interest in protecting them. In his dissent in the *Travelers Health* case, Justice Minton made it clear that for him this was not enough.

C. Procedure in Federal Courts

1. *Jurisdiction and Venue.* The problem of jurisdiction, particularly over foreign corporations, was often presented in federal courts in much the same form as in state courts. While in many cases the plaintiff can sue in either a state or federal court,[482] even if he chooses a state court, the defendant can have the action removed to a federal court.[483] Whether the action is brought in federal court by the plaintiff or removed to it by the defendant, the jurisdiction of the federal court is ordinarily

477. *Id.* at 658-59 (dissenting opinion).
478. 347 U.S. 340 (1954).
479. Polizzi v. Cowles Magazines, Inc., 345 U.S. 663 (1953).
480. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).
481. Hanson v. Denckla, 357 U.S. 235 (1958).
482. See 28 U.S.C. § 1332 (Supp. V, 1958).
483. 28 U.S.C. § 1441 (1952).

limited to the borders of the state in which it is located.[484] In a libel suit by a Florida resident against the publisher of *Look Magazine,* brought in a Florida court and removed by the defendant to a federal court, the court of appeals had affirmed dismissal of the action[485] on the ground that the federal court lacked *jurisdiction* because Look was not "doing business" in Florida within the meaning of the federal *venue* statute applicable to actions brought in federal courts.[486] In an opinion by Justice Black, three members of the Court seized this opportunity to urge that Look was doing sufficient business in Florida to justify suit against it in Florida for jurisdictional and venue purposes.[487] However, Justice Minton wrote the Court's opinion reversing on a different and less controversial ground. Noting that this was a removed action governed by a different venue statute,[488] he held that venue was properly laid in the federal district court embracing the area in which the state court was located.

In circumstances such as those described above, in the past a federal court might dismiss such an action under the doctrine of forum non conveniens even though it had jurisdiction. Since such a dismissal might result in very harsh consequences for the plaintiff, in 1948 Congress authorized transfer, rather than dismissal, of the action "to any other district or division where it might have been brought" "for the convenience of parties and witnesses, in the interest of justice."[489] Justice Minton wrote the Court's opinion in an important 5-3 decision in *Norwood v. Kirkpatrick*[490] holding that this statute gave the district court in which the action was brought broader discretion to transfer actions than had previously existed under the doctrine of forum non conveniens for dismissal of actions. Justice Minton reasoned that:

> When Congress adopted § 1404(a), it intended to do more than just codify the existing law on *forum non conveniens.* As this Court said in *Ex parte Collett* . . . Congress, in writing § 1404(a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of *forum non conveniens,* dismissal of the action,

484. See FED. R. CIV. P. 4(f); Note, *Jurisdiction of Federal District Courts over Foreign Corporations,* 69 HARV. L. REV. 508 (1956).
485. Polizzi v. Cowles Magazines, Inc., 197 F.2d 74 (5th Cir. 1952).
486. 28 U.S.C. § 1391 (1952).
487. Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 667-72 (1953) (concurring opinion).
488. 28 U.S.C. § 1441(a) (1952).
489. 28 U.S.C. § 1404(a) (1952); see Note, *Limitations on the Transfer of Actions under the Judicial Code,* 64 HARV. L. REV. 1347 (1951).
490. 349 U.S. 29 (1955).

> was eliminated by the provision in § 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader.[491]

Although the dissenters appear correct in asserting that this decision limits the plaintiff's "right" to choose the forum, the result provides desirable flexibility which, by enhancing the usefulness of this remedial statute, should improve the administration of justice in federal courts.

Justice Minton also wrote the Court's opinion disposing of the complicated procedural tangle which arose following a state administrative award of damages in a railroad's condemnation suit.[492] The railroad appealed both to a federal district court and to a state court, and it removed the latter action from the state court to the federal court. The Court held that the appeal directly to the federal court was unauthorized and properly dismissed, although two Justices urged that the appeal should be treated as an original action over which the federal court had diversity jurisdiction.[493] The Court also held that the railroad could not remove the other appeal from the state court to the federal court. Justice Minton reasoned that only a defendant can remove an action under the federal statute, and that the railroad was the plaintiff for purposes of the federal removal statute, even though it was treated as the defendant under state law. Consistent with his position in other cases that the state's characterization was not conclusive for purposes of interpreting the federal statute, he urged that:

> For the purpose of removal, the federal law determines who is plaintiff and who is defendant. It is a question of the construction of the federal statute on removal, and not the state statute. The latter's procedural provisions cannot control the privilege of removal granted by the federal statute. . . . Here the railroad is the plaintiff under 28 U.S.C. § 1441(a) and cannot remove.[494]

491. *Id.* at 32.
492. Chicago, R.I. & P.R.R. v. Stude, 346 U.S. 574 (1954).
493. *Id.* at 582-84, 584-86 (concurring opinions).
494. *Id.* at 580.

Another jurisdictional problem resulted from the attempt of a discharged Government employee to sue the Civil Service Commission in a federal court in Louisiana by serving the United States District Attorney and the Regional Director of the Civil Service Region.[495] Justice Minton wrote the Court's opinion holding that since the Civil Service Commission was not a suable corporate entity, suit must be brought against the Commissioners individually who must be served personally to obtain jurisdiction over them.

Sometimes the jurisdictional question related to the subject matter of, rather than the parties to, the action. For example, Justice Minton wrote for a unanimous court holding that a federal district court has jurisdiction over an action based on the plaintiff's claim that a state statute unconstitutionally denied it equal protection of the laws, even though the state court had not yet interpreted the statute.[496]

These cases, of which *Norwood v. Kirkpatrick* is probably the only one of lasting significance, are but a small sampling illustrating the wide variety of jurisdictional problems which may arise in federal courts. Perhaps due to his service as a court of appeals judge, Justice Minton's opinions demonstrate a broad understanding of jurisdictional problems in federal courts and a preference for improving the administration of justice in them.

2. *Withdrawal of Case from Jury.* A problem which has increasingly plagued the Court involves the circumstances in which a trial court may direct a verdict for the defendant, particularly in actions under the Federal Employers' Liability Act,[497] thereby taking the case away from the jury. The Court's current policy, over strong protests, especially from Justice Frankfurter,[498] appears to be to grant certiorari in every such case, and on the merits, at least one court of appeals has concluded,[499] to require that no FELA case be taken from the jury. With respect to the merits in such cases, Justice Minton pursued a middle ground depending on the facts of the case. Thus, while he joined in one decision reversing a directed verdict for the defendant,[500] he wrote the Court's opinion sustaining judgment n.o.v. for the defendant railroad in a FELA suit where he concluded that there was no evidence of negligence

495. Blackman v. Guerre, 342 U.S. 512 (1952).
496. Doud v. Hodge, 350 U.S. 485 (1956).
497. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952).
498. *E.g.,* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 524-58 (1957) (dissenting opinion); see Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA,* 69 HARV. L. REV. 1441 (1956).
499. See Gibson v. Elgin, J. & E. Ry., 246 F.2d 834 (7th Cir. 1957).
500. Stone v. New York Cent. & St. L.R.R., 344 U.S. 407 (1953).

by the defendant.[501] While Justices Black and Douglas urged that "the taking of this verdict from petitioner is a totally unwarranted substitution of a court's view of the evidence for that of a jury,"[502] Justice Minton concluded that:

> True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a proof. . . . Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it.
>
> The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged. Her evidence showed he fell before the train stopped.[503]

3. *Appellate Review.* In a similar case brought under the Jones Act[504] the defendant had moved for a directed verdict, decision upon which was reserved until after the jury rendered a verdict for the plaintiff, at which time the trial court denied both this motion and defendant's post-verdict motion "to set aside the verdict."[505] Upon appeal the court of appeals reversed the denial of the motion for a directed verdict and directed the trial court to enter judgment for the defendant.[506] However, the Court held 5-4 that the court of appeals lacked power to direct the entry of judgment for the defendant, and that the defendant was entitled only to a new trial, because the defendant's post-verdict motion had "failed to comply with permission given by [Federal Rule] 50 (b) to move for judgment n.o.v. after the verdict."[507] Justice Minton joined Justice Frankfurter's dissent which urged that the decision emphasized form over substance and put a premium on redundant ritual which defeats the liberal purpose of the rule.[508] Justice Minton also dissented separately[509] urging that the judgment of the court of appeals was authorized by a then recent statute which empowered federal appellate courts, upon reversal of any judgment, "to direct the entry of such appropriate judgment . . . as may be just under the circumstances."[510] He had

501. Moore v. Chesapeake & O. Ry., 340 U.S. 573 (1951).
502. *Id.* at 580 (dissenting opinion).
503. *Id.* at 576.
504. 38 Stat. 1185 (1915), as amended, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).
505. Johnson v. New York, N.H. & H.R.R., 344 U.S. 48, 59 (1952).
506. Johnson v. New York, N.H. & H.R.R., 194 F.2d 194 (2d Cir. 1952).
507. Johnson v. New York, N.H. & H.R.R., 344 U.S. 48, 54 (1952).
508. *Id.* at 54-62 (dissenting opinion).
509. *Id.* at 65 (dissenting opinion).
510. 28 U.S.C. § 2106 (1952).

earlier relied on the same statute in his opinion for the Court sustaining the judgment of the court of appeals directing a new trial in a criminal case upon reversal of the defendant's conviction.[511]

Justice Minton wrote the Court's opinion in another case involving factual issues, reversing the court of appeals, and holding that the district court's judgment for the plaintiff was not "clearly erroneous."[512] Again Justice Minton analyzed the testimony, this time concluding that there was sufficient evidence of causal negligence to support a judgment for the plaintiff:

> On evidence showing these facts, including the opinion of the experts, we think there was substantial evidence from which the District Court could and did find that respondent was negligent in permitting these Chinese, from the infested area of Shanghai, to have the run of the ship and use of its facilities, and in furnishing the crude and exposed latrine provided on the deck of the ship, by reason whereof the petitioner contracted polio.
>
> Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved, supported as they were by the best judgment medical experts have upon the subject today, the petitioner was contaminated by the Chinese who came aboard the ship November 11, 1945, at Shanghai. Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous.[513]

While the foregoing decision indicates a willingness on the part of Justice Minton and the Court to give great weight to the factual conclusions of the trial court, he and the Court were equally insistent that those conclusions be based upon evidence in the record. Thus, he wrote the Court's opinion reversing a decision of the Court of Claims because it had relied on facts outside the record.[514] He concluded:

> Thus the case was decided not only upon what was alleged in the pleadings but upon other allegations as well, as to which no clear inkling appears in the record. Because the Court of

511. Bryan v. United States, 338 U.S. 552 (1950).
512. McAllister v. United States, 348 U.S. 19 (1954).
513. *Id.* at 22-23.
514. Standard-Vacuum Oil Co. v. United States, 339 U.S. 157 (1950).

> Claims considered these additional allegations, it is urged that we should also consider them. But we cannot consider such allegations in determining the sufficiency of the cause stated. After all, pleadings and the making of a proper record have not been dispensed with. They still have a function to perform. This case points up that function. We will not review questions not clearly raised on the record.[515]

4. *Post-Judgment Relief.* Just as in criminal cases, sometimes the losing party in civil litigation seeks another chance. Federal Rule 60(b) authorizes each district court to relieve a party from a final judgment on several specific grounds or for "any other reason justifying relief from the operation of the judgment."[516] Justice Minton wrote the Court's opinion refusing to vacate a denaturalization decree four years after the time for appeal had expired where the petitioners alleged that they had failed to do so in reliance in part on advice of an immigration officer.[517] To Justice Minton the controlling consideration was that "there must be an end to litigation someday, and free, calculated deliberate choices are not to be relieved from."[518]

Unlike some of his colleagues, Justice Minton's votes and opinions with respect to procedural problems such as these were not influenced primarily by a desire to protect the supposed rights of one of the parties, usually the plaintiff. Within the scope of the applicable statutes and rules, he consistently took positions which conferred considerable discretion on both trial and appellate courts and which promoted the administration of justice in the federal courts. His emphasis on bringing an end to litigation was consistent with the latter goal.

D. Administrative Procedure

Congress has delegated much of the responsibility for administering many of its far-flung regulatory schemes to administrative agencies, and a startling proportion of the volume of the Court's business entails review of action taken by such agencies. The two procedural questions which recur most frequently relate to the type of hearing required in the administrative proceedings and the nature of and extent to which review of the administrative action is available in the federal courts.

1. *The Type of Hearing Available.* In a federal criminal trial the Constitution ensures the defendant the right to a full-fledged jury trial,

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515. *Id.* at 160.
516. Fed. R. Civ. P. 60(b)(6).
517. Ackermann v. United States, 340 U.S. 193 (1950).
518. *Id.* at 198; *cf.* Callanan Road Improvement Co. v. United States, 345 U.S. 507 (1953).

except in unusual proceedings such as contempt cases. In administrative proceedings, such as those involving exclusion or deportation of aliens, which bear some relationship to criminal trials, the Court has repeatedly been required to determine the extent to which Congress had limited, or could limit or even do away with, a hearing for the individual resisting the Government's assertion of power.[519]

a. *Alien Deportation and Exclusion Proceedings.* The federal government possesses and exercises broad power in directing the deportation of aliens. A prospective deportee who claims that he does not fall within any deportable class is ordinarily entitled to a hearing on his claim.[520] In 1950 Justice Minton joined in a decision[521] holding that deportation hearings were subject to the hearing requirements of the Administrative Procedure Act,[522] but he also joined in a subsequent decision[523] holding that the separation of functions provisions of the Administrative Procedure Act[524] had been made inapplicable to deportation hearings by the 1952 Immigration Act.[525]

Some relief for aliens found deportable was afforded by statutory provisions conferring discretion on the Attorney General not to deport such an alien.[526] Implementing this and other provisions, the Attorney General set up a Board of Appeals to hear requests for such relief.[527] On the ground that the statute put the matter solely in the discretion of the Attorney General, Justice Minton joined in a dissent from a decision holding that petitioner could not be denied such relief if, as he claimed, the Attorney General had influenced the Board of Appeals by putting petitioner's name on a special list of aliens to be deported.[528] Subsequently he was in the majority holding with respect to the same alien that such discretionary relief could be denied where it had been found as a fact that the Board of Appeals was not influenced by the Attorney General's action.[529] He also joined in a decision holding that the hearing

519. See, *e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); CAB v. State Airlines, Inc., 338 U.S. 572 (1950); Reilly v. Pinkus, 338 U.S. 269 (1949); Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193 (1956).
520. The Japanese Immigrant Case, 189 U.S. 86 (1903).
521. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).
522. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).
523. Marcello v. Bonds, 349 U.S. 302 (1955).
524. 60 Stat. 240 (1946), 5 U.S.C. § 1004(a) (1952).
525. 66 Stat. 210 (1952), 8 U.S.C. § 1252(b) (1952); see 64 Stat. 1048 (1950).
526. 39 Stat. 889 (1917), as amended, 54 Stat. 671 (1940), 56 Stat. 1044 (1942), 62 Stat. 1206 (1948); see 66 Stat. 214 (1952), 8 U.S.C. § 1354 (1952).
527. 8 C.F.R. § 6.1 (1958).
528. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).
529. Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955).

officer may rely on confidential information in denying such discretionary relief.[530]

An alien resisting deportation is ordinarily entitled to a hearing, even though the foregoing cases illustrate that it may be more limited than a criminal trial. Far less fortunate is an alien seeking entry to this country for the first time. In *United States ex rel. Knauff v. Shaughnessy*[531] Justice Minton wrote another of his most important and most sharply criticized opinions, holding that an alien seeking admission to this country under the War Brides Act[532] may be excluded without a hearing. The War Brides Act authorized admission of the alien spouse of a veteran without compliance with quota or physical and mental limitations if he or she was "otherwise admissible under the immigration laws."[533] Justice Minton held that to be otherwise admissible, an alien must comply with securtiy regulations relating to immigrants which did and constitutionally could authorize exclusion on the basis of confidential information without a hearing. This decision results in an ultimate restriction on procedural protections, complete denial of any hearing. Here, however, the Government was not attempting to reach out and affirmatively deprive Mrs. Knauf of her freedom, but simply to keep her from coming into this country in the first instance. As Justice Minton said:

> At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides.
>
> . . . The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.
>
> . . . .
>
> Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.[534]

In *Kwong Hai Chew v. Colding*[535] Justice Minton was the lone dissenter from a decision holding that an alien who was seeking reentry

530. Jay v. Boyd, 351 U.S. 345 (1956).
531. 338 U.S. 537 (1950).
532. 59 Stat. 659 (1945).
533. *Ibid.*
534. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950).

after having spent his entire time of departure on an American ship was entitled to a hearing. The limited applicability of this decision was clearly illustrated later in the same term in *Shaughnessy v. United States ex rel. Mezei*[536] in which Justice Minton joined in a 5-4 decision holding that an alien who had lived here 28 years and left to visit his dying mother could, upon his return, be excluded and detained indefinitely without a hearing.

The *Knauf* and *Mezei* cases have been severely criticized. Justice Minton's statement to the effect that any procedure authorized by Congress is due process for an entering alien has been described as "a patently preposterous proposition."[537] It would be no answer for this critic that the proposition did not originate with Justice Minton since Justice Minton's application of this "harsh precept" "ignore[s] the painful forward steps of a whole half century of adjudication, making no effort to relate what then is being done to what the Court has done before," "as if nothing had happened in the years between."[538]

But conceding, as seems clear, that the Constitution does not stop at the shore line, it is still the *whole* Constitution and not merely the due process clause of the Fifth Amendment. For example, shortly before Justice Minton joined the Court, it held, in an opinion by Justice Black, that under the war power, even a *resident* alien could be *deported* without a hearing.[539] The question in these cases is again one of power—whether or not the Constitution expressly or by implication has conferred power on Congress and the President to exclude entering aliens without a hearing. In the *Knauff* case Justice Minton answered the question in the affirmative, relying heavily on earlier decisions of the Court.[540] But even if *Knauff* is correct, Justice Minton's position in *Kwong Hai Chew* and *Mezei* is questionable. An alien seeking reentry after long residence in this country is in most respects more like a deportee than an alien seeking entry for the first time. To hold that his procedural rights are substantially less than those of a deportee who entered the country illegally requires reliance on arbitrary geographical concepts rather than on sovereign power conferred on the executive in the conduct of foreign relations. Moreover, even if such an alien may be excluded without a

535. 344 U.S. 590 (1953).
536. 345 U.S. 206 (1953).
537. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362, 1392 (1953).
538. *Id.* at 1391, 1396; see also *Developments in the Law-Immigration and Nationality,* 66 HARV. L. REV. 643, 671-76 (1953).
539. Ludecke v. Watkins, 335 U.S. 160 (1948); *cf.* Reid v. Covert, 354 U.S. 1 (1957).
540. *E.g.,* Ekiu v. United States, 142 U.S. 651 (1892).

hearing, it is hard to reconcile the indefinite detention of Mezei with any concept of fundamental fairness. It is one thing to bar an alien's entry and quite another to hold him prisoner indefinitely.

b. *Selective Service Exemptions.* The continuing international crisis has necessitated a comprehensive system for mobilization of military manpower. The exemption of ministers[541] and conscientious objectors[542] from these requirements of military service has created difficult factual problems as to the truth of claims to such an exemption. Congress provided for an Appeal Board to resolve such factual disputes, and, to aid this board in reaching a decision with respect to claimed conscientious objectors, it has also required an FBI investigation and an advisory Justice Department recommendation, following a "hearing."[543]

In *United States v. Nugent*[544] Justice Minton joined the opinion of the Court holding that the statutory requirement for a "hearing" does not require disclosure to the registrant of the FBI report but only a summary of it. Two subsequent "draft dodging" convictions were reversed, the first because such a summary had not been furnished to the registrant for use at the Justice Department hearing,[545] and the latter because the Justice Department's recommendation had not been made available to the defendant in connection with the proceedings before the Appeal Board.[546] Justice Minton dissented in both of these cases on the basis of his belief, discussed below, that the scope of review of draft board classifications is extremely limited.

The problem in these cases is quite different from that relating to excluded aliens or civilians tried by court-martial. In those cases Congress had provided either for no hearing at all or for one different from that customary for civilian criminal defendants. Here, however, Congress had provided for a hearing, and in the absence of any clear statutory limitations, the same policy of developing the truth which required production of the informer's statements in the *Jencks* and *Gordon* cases would require production of the FBI report and the Justice Department recommendation. Of course, it may be that portions of the report would contain material which, in the interest of national security, should not be revealed, but the answer would seem to be to exclude those portions and not the entire report. It is difficult to see how such full disclosure would result in greater interference with selective service procedures

541. 62 Stat. 611 (1952), 50 U.S.C. App. § 456(g) (1952).
542. 62 Stat. 613 (1952), 50 U.S.C. App. § 456(j) (1952).
543. *Ibid.*
544. 346 U.S. 1 (1953).
545. Simmons v. United States, 348 U.S. 397 (1955).
546. Gonzales v. United States, 348 U.S. 407 (1955).

"geared to meet the imperative needs of mobilization and national vigilance"[547] than disclosure of a truly fair summary. The limitations on a hearing which Justice Minton voted to sustain in the alien and civilian court-martial cases can be justified on the ground that Congress had power to impose them on the basis of its expressed belief that other considerations outweighed the individual's right to maximum development of the truth. But where, as in the selective service cases, Congress has provided for a hearing, Justice Minton and the Court were not justified in imposing unnecessary limitations on the development of the truth in that hearing.

2. *Right to and Scope of Review.* a. *Standing and Ripeness for Review.* To have standing to obtain judicial review of an administrative order, the party seeking review must have been adversely affected by the order. In *Travelers Health Ass'n v. Virginia*[548] the Virginia Corporation Commission had directed a Nebraska insurance company to cease solicitation of or sales to Virginia residents until it obtained authority from the Commission pursuant to the Virginia "Blue Sky Law."[549] Justice Minton, dissenting, urged that the company was not entitled to review of the order because the order carried no sanctions. He urged that:

> The Commission has in no way attempted to enforce the order issued by the Commission against appellants. Therefore appellants have not been hurt, and the question of due process is not reached. In the scheme of the statute, publicity appears to be the sole sanction of § 6. I know of no reason why Virginia may not go through this shadow-boxing performance in order to publicize the activities of appellants in Virginia and notify its citizens that appellants have not qualified under the Securities Law.[550]

His treatment of the Commission's order as a publicity release is consistent with his position in *Joint Anti-Fascist Refugee Comm'n v. McGrath*[551] in which he joined a dissent which similarly characterized the Attorney-General's list of subversive organizations and would have dismissed the appeal of a listed organization as not ripe for review.

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547. United States v. Nugent, 346 U.S. 1, 10 (1953).
548. Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).
549. VA. CODE ANN. § 13.1-501-27 (1950).
550. Travelers Health Ass'n v. Virginia, 339 U.S. 643, 655-56 (1950) (dissenting opinion).
551. 341 U.S. 123, 202-05 (1951) (dissenting opinion); *but cf.* Adler v. Board of Educ., 342 U.S. 485 (1952) (where Justice Minton's majority opinion did not discuss a similar problem although it was the basis of a lengthy dissenting opinion); see Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1336 (1955).

b. *Right to Review.* In some instances the right to judicial review of administrative action is limited or abrogated by statute. A number of statutes provide that the administrative determination shall be "final." To Justice Minton "final" meant just that and precluded judicial review, at least under ordinary circumstances. For example, in a similar type of case he wrote the Court's opinion holding that where a government *contract* makes the decision of the agency head final, his decision is not reviewable in the absence of fraud on his part.[552] The Court was faced with a number of other cases requiring determination of the meaning and validity of statutory limitations on the scope of review of selective service exemptions and alien deportation and exclusion orders.

With respect to Mrs. Knauff's exclusion order made without a hearing, Justice Minton said: "The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[553] It has been pointed out that this is not a complete answer to the entrant's challenge to the exclusion order since a limited form of review is available by habeas corpus.[554] But it is clear that to Justice Minton review by habeas corpus raised solely a question of *power* which, whether rightly or wrongly, he thought Congress possessed with respect to entering aliens. His opinion in *Knauff* is strikingly similar to his concurring opinion in a court-martial case, *Burns v. Wilson,*[555] and in each instance he denied the Court's power to extend the scope of review by the federal courts beyond determination of the jurisdiction of the tribunal which made the order challenged.

Similarly, he joined in an opinion[556] holding that where Congress had provided that the administrative determination in a deportation proceeding should be "final,"[557] review was unavailable under the Administrative Procedure Act which excepted from its review requirements administrative orders review of which was expressly precluded by statute.[558] After re-enactment of the immigration laws in 1952,[559] the Court reached the contrary result, although Justice Minton's dissent seems correct in

552. United States v. Wunderlich, 342 U.S. 98 (1951).
553. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).
554. 28 U.S.C. § 2241 (1952); see Hart, *supra* note 537, at 1391.
555. 346 U.S. 137, 147 (1953) (concurring opinion).
556. Heikkila v. Barber, 345 U.S. 229 (1953).
557. 39 Stat. 889 (1917), as amended, 54 Stat. 1238 (1940).
558. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1952).
559. 66 Stat. 210 (1952), 8 U.S.C. § 1252(b) (1952).

concluding from the legislative history that in re-enacting the immigration statutes Congress intended no change in the scope of review.[560]

Justice Minton's views with respect to the review of the classification of alleged conscientious objectors and ministers, and review of their criminal convictions for refusing to submit to induction, were quite similar to those he maintained in interpreting the statutes relating to review of alien deportation and exclusion orders. In *Estep v. United States,*[561] decided before his appointment to the Court, where Congress had provided that the draft board classification should be "final,"[562] the Court held that a registrant who refused to submit to induction could challenge his classification at his subsequent trial "only if there is no basis in fact for the classification which it gave the registrant" in which case "its action would be lawless and beyond its jurisdiction."[563] When the Court subsequently upset a conviction in *Dickinson v. United States*[564] on the ground that the defendant had made out a prima facie case as a minister, Justice Minton joined a dissent which urged that this was a factual dispute rather than a question of jurisdiction. He later dissented separately in three decisions upsetting similar convictions of claimed conscientious objectors on the basis of a variety of failures by those administering the selective service machinery to follow the statutory requirements.[565] As an original matter, the *Estep* decision may well have been wrong in ignoring the Congressional command that the draft board classification is "final." Certainly it does not kill the spirit of the statute to hold that "final" means just that and not "almost final" or "final, except." Moreover, even accepting that decision, the dissenters in the *Dickinson* case appear correct in concluding that the Court had extended the scope of review far beyond "jurisdictional" issues to disputed factual questions. But in two of the subsequent cases, Justice Minton dissented in reliance on the *Estep* decision on the ground that the Board's decision was reasonable even if erroneous.[566] Since those cases involved errors of *law,* the *Estep* decision would not appear to preclude review, however honest

560. Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).
561. 327 U.S. 114 (1946).
562. 54 Stat. 893 (1940); see 62 Stat. 620 (1948), as amended, 50 U.S.C. App. § 460(b) (1952).
563. Estep v. United States, 327 U.S. 114, 122, 121 (1946).
564. 346 U.S. 389 (1953).
565. Sicurella v. United States, 348 U.S. 385 (1955); Simmons v. United States, 348 U.S. 397 (1955); Gonzales v. United States, 348 U.S. 407 (1955); *cf.* Witmer v. United States, 348 U.S. 375 (1955).
566. Simmons v. United States, *supra* note 565; Gonzales v. United States, *supra* note 565. In Sicurella v. United States, *supra* note 565, the principal basis of his dissent rested on interpretation of the statutory exemption for conscientious objectors.

the Board's decision, and however debatable the question of law may have been.

The cases involving the right to a hearing and to review by the courts of decisions in proceedings closely akin to ordinary criminal trials involve a number of important problems. Fundamental, of course, were again issues of power. With respect to entering aliens Justice Minton took the position that whatever procedure Congress provided is due process, just as he did with respect to court-martial convictions of military personnel. As to both entering aliens, and deportable aliens requesting discretionary relief, he emphasized, as he did in the *Adler* case, that the person aggrieved was claiming a privilege rather than a right.[567] This analysis supported his position that the Attorney-General's discretion to grant relief to deportable aliens is unfettered, which is also closely akin to his view in the contempt cases upholding the power of the trial court despite its apparent prejudice.[568] Conceding both that privileges were involved and that the distinction is meaningful, it is not a complete answer.[569] Even in conferring privileges, the requirement of fundamental fairness embodied in the due process clause would ordinarily preclude *arbitrary* governmental action except where unusual circumstances bring other constitutional provisions into play, particularly in proceedings which inherently involve a stigma closely akin to criminal guilt.[570] Thus, it is easy to sympathize with those who protested against decisions based on the secret statements of "confidential informants," or, depending on one's outlook, "faceless informers."[571] But it is not the Court's function to pass on the wisdom of such a policy, and the basic question of power is often an extremely difficult one the answer to which depends upon a delicate balancing of important competing considerations and constitutional powers.

c. *Scope of Review.* With respect to review of administrative factual determinations Justice Minton joined the Court's opinion in *Universal Camera Corp. v. NLRB*[572] holding that the agency's findings must be supported by substantial evidence on the record as a whole. However,

567. *Compare* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950), *with* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954) (dissenting opinion), *and* Jay v. Boyd, 351 U.S. 345 (1956).

568. See *In re* Murchison, 349 U.S. 133 (1955); Offutt v. United States, 348 U.S. 11 (1954).

569. See Davis, *The Requirement of a Trial-Type Hearing,* 70 HARV. L. REV. 193, 222-80 (1956).

570. See, *e.g.,* Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

571. See Jay v. Boyd, 351 U.S. 345, 376 (1956) (dissenting opinion).

572. 340 U.S. 474 (1951); see also NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951); Jafee, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951).

the dichotomy between questions of fact and questions of law is not always as clear in practice as it sounds in principle. For example, in a companion case Justice Minton dissented from the Court's opinion holding that there was sufficient evidence to support a finding that an employee who drowned in a rescue attempt from his employer's water recreational area was acting in the scope of his employment.[573] Justice Minton apparently concluded that the basic facts established as a matter of law that the employee was outside the scope of his employment, urging that:

> This finding is false and has no scintilla of evidence or inference to support it.
>
> I am unable to understand how this Court can say this is a fact based upon evidence. It is undisputed upon this record that the deceased, at the time he met his death, was outside the recreational area in the performance of a voluntary act of attempted rescue of someone unknown to the record. There can be no inference of liability here unless liability follows from the mere relationship of employer and employee. The attempt to rescue was an isolated, voluntary act of bravery of the deceased in no manner arising out of or in the course of his employment. The only relation his employment had with the attempted rescue and the following death was that his employment put him on the Island of Guam.[574]

Sometimes the propriety of an administrative factual finding is interwoven with a challenge to the power of the agency to take particular action. For example, in reviewing an I.C.C. order fixing the points at which line-haul service to particular plants ended, Justice Minton wrote the Court's opinion holding "that the Commission has the power to fix the point at which line-haul or carrier service begins and ends"[575] and that "there is substantial evidence to support the Commission's findings that the convenient points for the beginning and end of line-haul were at the interchange tracks."[576] In this case as in a number of others where administrative action (whether by legislative regulation or judicial decision) was challenged on the ground it was contrary to or unauthorized by the applicable statute, Justice Minton consistently voted to sustain the power asserted by the agency on the ground that the action taken was within the discretion delegated to it by Congress. Perhaps his most important

573. O'Leary v. Brown-Pac.-Maxon, Inc., 340 U.S. 504 (1951).
574. *Id.* at 509 (dissenting opinion); *cf.* Thompson v. Lawson, 347 U.S. 334 (1954).
575. United States v. United States Smelting Refining & Mining Co., 339 U.S. 186, 197 (1950).
576. *Id.* at 194.

opinion of this nature was in *Ramspeck v. Federal Trial Examiners Conference*[577] sustaining the regulations promulgated by the Civil Service Commission with respect to hearing examiners. By rejecting contentions that all examiners in a particular agency must be of the same grade and must be assigned to cases in mechanical rotation without regard to the nature of the case or the competence or experience of the examiner, he sustained the Commission's power to provide desirable flexibility and thereby enhance the efficiency of the administrative processes. His deference to the administrative expertise underlying the Commission's regulations is illustrated by his observation that "these specifications of necessity must be subjective. They are not based so much on evidence as on judgment. It is a discriminating judgment and one Congress committed to the experience and expertise of the Civil Service Commission, not the Courts."[578]

Similarly, in the Court's opinion upholding an ICC rate order establishing a barge rate lower than the comparable rail rate, even though there was no cost justification for the difference, Justice Minton reasoned that:

> Neither the Commission nor this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate, or differential. On the other hand, the considerations just discussed were rightly taken into account by the Commission. We must not lose sight of the fact that the Commission has the interests of shippers and consumers to safeguard as well as those of the carriers. . . . The accommodation of the factors entering into rate structures, including competition, is a task peculiarly for the Commission.[579]

Deference to the administrative judgment also underlay his opinion for the Court, sustaining an ICC order providing a separate switching tariff applicable to livestock but not to other types of freight, where he said:

> The huge quantities of dead freight which are handled and the restricted facilities of Ashland Yards have resulted in the development, over a period of seventy years, of a complicated, intricate pattern of operation. For this reason, any attempt to change the pattern calls for the most expert consideration and administrative judgment—a task that courts are ill-fitted to

577. 345 U.S. 128 (1953).
578. *Id.* at 137.
579. Alabama G.S.R.R. v. United States, 340 U.S. 216, 223-24 (1951).

perform. If the Commission gave weight to the relevant factors, its decision should not be overturned. . . .

> . . . Whether the system for the delivery of livestock into Chicago which has existed for over seventy years at an established line-haul rate, and which has recognized definite terminals calling for a minimum of train movements in a highly congested area, should be displaced by another system which would further complicate the operations and would necessitate the use of properties and services not included when the present line-haul rates and terminals were fixed, is a question committed to the administrative judgment of the Commission. When that judgment is based on findings abundantly supported by the evidence on the whole record, as it is in this case, it is the duty of the courts to sustain it.[580]

He took much the same position in dissenting from the Court's decision upsetting ICC railroad tariff provisions absolving railroads from liability for stated percentages of damage to eggs.[581] The Court held that the Commission's findings were insufficient to support its conclusions that these percentages represented the damage ordinarily incurred in the shipment of eggs without fault of the carrier. Justice Minton dissented, saying:

> I think the Commission had the power to promulgate regulations prescribing, after full hearing, a reasonable deduction for loss due to the inherent defects of the commodity transported. The nature of the commodity and the impossibility of deciding this humpty-dumpty question of who or what broke the egg is a proper subject for regulation. Such a regulation would not be a limit of liability but a yardstick for measuring the damage not caused by the carrier but due to the inherent nature of the commodity.
>
> . . . .
>
> The Commission report embodies basic findings to support this conclusion. . . . The tolerances represent the considered judgment of the Commission, after hearing voluminous evidence as to the nature of shell eggs and the way they are handled at railpoint, off railpoint and during shipment. I can-

580. Swift & Co. v. United States, 343 U.S. 373, 381-82 (1952).

581. Secretary of Agriculture v. United States, 350 U.S. 162 (1956); *cf.* FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1955); FTC v. Ruberoid Co., 343 U.S. 470 (1952).

not say that this is not an allowable judgment for the Commission to make.[582]

The adequacy of the agency's findings were also challenged in *American Airlines, Inc. v. North Am. Airlines, Inc.*[583] in which Justice Minton wrote the Court's opinion upholding a CAB order directing North American to cease using that name because of its similarity to American Airlines. The dissenting justices urged that the Board must find that passengers missed flights or bought the wrong tickets in order to sustain its order.[584] But pointing to the Board's findings that public confusion from the similarity in names had caused passengers to direct inquiries to, check in at and attempt to retrieve baggage from, the wrong airline, Justice Minton concluded that:

> Under § 411 it is the Board that speaks in the public interest. We do not sit to determine independently what is the public interest in matters of this kind, committed as they are to the judgment of the Board. We decide only whether, in determining what is the public interest, the Board has stayed within its jurisdiction and applied criteria appropriate to that determination. The Board has done that in the instant case. Considerations of the high standards required of common carriers in dealing with the public, convenience of the traveling public, speed and efficiency in air transport, and protection of reliance on a carrier's equipment are all criteria which the Board in its judgment may properly employ to determine whether the public interest justifies use of its powers under § 411.[585]

Justice Minton also wrote the Court's opinion upholding the exercise of discretion by the NLRB in refusing to deduct state unemployment compensation benefits from back pay awards.[586] He pointed out that:

> To effectuate the policies of the Act the Board has broad but not unlimited discretion. . . . We must not, however, be more mindful of the limits of the Board's discretion than we are of our own limited function in reviewing Board orders.[587]

But he also relied on the fact that Congress had re-enacted the applicable provision with knowledge of this position of the Board, saying:

582. Secretary of Agriculture v. United States, 350 U.S. 162, 177-78 (1956) (dissenting opinion).
583. 351 U.S. 79 (1956).
584. *Id.* at 87-90 (dissenting opinion).
585. *Id.* at 85.
586. NLRB v. Gullett Gin Co., 340 U.S. 361 (1951).
587. *Id.* at 362-63.

> In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the earlier legislation as they had been applied by the Board. Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts.[588]

This led him to dissent from the Court's opinion in a subsequent case sustaining a change by the Board in computing its back pay formula to a quarterly basis.[589]

He similarly objected to a changed administrative interpretation of the Fair Labor Standards Act[590] which brought within the coverage of the Act employees engaged in new construction of facilities to be used in interstate commerce.[591] Dissenting from the Court's opinion sustaining the new interpretation, Justice Minton made a strong plea for consistency not only in administrative interpretations, but also in the Court's decisions, saying:

> It seems, therefore, that the Secretary of Labor has quite recently changed his mind about the application of the Act to new construction not yet used or not an integral part of interstate commerce. His change of mind should not change the law. This Court, which may change the law, seems to have changed its mind about the same time and without saying why it does so, except that the foregoing cases are of a different vintage. I am unable to distinguish the cases on the vintage test. Without overruling the *Raymond, White* and *Murphey* decisions and the number of cases decided by the Circuit Courts, this Court brushes them off as of another vintage.
>
> Reliance upon this Court's opinions becomes a hazardous business for lawyers and judges, not to mention contractors, who are not familiar with the vintage test.[592]

This case also illustrates that Justice Minton gave little or no weight to administrative interpretations of particular statutory provisions. Accordingly, he rejected the ICC's contention that the Safety Appliance

588. *Id.* at 366.
589. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).
590. 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-19 (1952), as amended, 29 U.S.C. §§ 201-19 (Supp. V, 1958).
591. Mitchell v. C.W. Vollmer & Co., 349 U.S. 427 (1955); *cf.* Alstate Constr. Co. v. Durkin, 345 U.S. 13 (1953); Thomas v. Kempt Brothers, 345 U.S. 19 (1953).
592. Mitchell v. C.W. Vollmer & Co., *supra* note 591, at 434 (dissenting opinion).

Act[593] does not apply to dome running boards, concluding that "there is no reason to import such a distinction into § 2 in order to deny the humane benefits of the Act to those who perform dangerous work on train cars that are not moving."[594] In another case he wrote the Court's opinion holding that government employees who worked on holidays were entitled both to holiday pay and time-and-a-half for the hours worked, rejecting a contrary administrative interpretation by the Comptroller General.[595]

His opinion for the Court in *Colgate-Palmolive-Peet Co. v. NLRB*[596] is another illustration of his lack of deference to administrative interpretations. Upsetting a decision of the NLRB contrary to the express provision of the statute which then permitted closed shop contracts, he concluded that:

> The claimed impotency of the contract as a defense here rests not upon any provision of the Act of Congress or of state law or the terms of the contract, but upon a policy declared by the Board. . . . It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.[597]

Similarly, in *Phillips Petroleum Co. v. Wisconsin,* he rejected the FPC's interpretation of its jurisdiction, saying:

> The Commission found that Phillips' sales are part of the production and gathering process, or are "at least an exempt incident thereof." This determination appears to have been based primarily on the Commission's reading of legislative history and its interpretation of certain decisions of this Court. Also, there is some testimony in the record to the effect that the meaning of "gathering" commonly accepted in the natural-gas industry comprehends the sales incident to the physical ac-

593. 36 Stat. 298 (1910), 45 U.S.C. § 11 (1952).
594. Shields v. Atlantic C.L.R.R., 350 U.S. 318, 324-25 (1956).
595. United States v. Kelly, 342 U.S. 193 (1952).
596. 338 U.S. 355 (1949).
597. *Id.* at 362-63.

> tivity of collecting and processing the gas. Petitioners contend that the Commission's finding has a reasonable basis in law and is supported by substantial evidence of record and therefore should be accepted by the courts, particularly since the Commission has "consistently" interpreted the Act as not conferring jurisdiction over companies such as Phillips. . . . We are of the opinion, however, that the finding is without adequate basis in law, and that production and gathering in the sense that those terms are used in § 1(b), end before the sales by Phillips occur.[598]

Taken together, these cases demonstrate that in reviewing administrative determinations, Justice Minton accorded considerable discretion to administrative agencies in implementing the congressional plan by regulation or decision, but that he did not defer to administrative experience or expertise in the interpretation of statutory provisions.

E. PROCEDURE IN THE SUPREME COURT

Article III of the Constitution limits the jurisdiction of federal courts to certain types of "cases" and "controversies" with respect to most of which "the Supreme Court shall have appellate jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make."[599] Justice Minton joined in several decisions holding that the Court lacked jurisdiction because there was no case or controversy. For example, the Court refused to review a challenge to the reading of the Old Testament in public schools where the only challengers were a taxpayer and the parent of a graduated child.[600]

The Court has also devised a number of closely related rules limiting the circumstances under which it will decide questions raised by the parties, one of which is the requirement that a party must have "standing" to raise the question.[601] Application of this rule enables the Court to avoid deciding difficult questions in trumped-up lawsuits and to prevent parties from challenging action or legislation on grounds which have no application to them. In *Barrows v. Jackson*[602] a white seller who broke a racially-restrictive covenant by permitting the property to be used by a non-Caucasian defended an action for breach of contract on the ground that such covenants had been held to deny equal protection of

598. 347 U.S. 672, 677-78 (1954).
599. U.S. CONST. art. III.
600. Doremus v. Board of Educ., 342 U.S. 429 (1952).
601. See, *e.g.*, Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (concurring opinion).
602. 346 U.S. 249 (1953).

the laws in *Shelley v. Kramer*.[603] However, the fact that no non-Caucasian affected by the covenant was a party to this action against the white seller made it difficult for the Court to extend the holding of the *Shelley* case to this action without at the same time doing violence to its rule concerning standing. Writing for the Court, Justice Minton carefully distinguished both the jurisdictional decisions and those in which the party challenging state action either had no real interest in the outcome or sought to make a shotgun attack on comprehensive legislation. He held that this was an appropriate case in which to make an exception to the rule, saying:

> But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. . . .
>
> Consistency in the application of the rules of practice in this Court does not require us in this unique set of circumstances to put the State in such an equivocal position simply because the person against whom the injury is directed is not before the Court to speak for himself. The law will permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use.[604]

The Court similarly refuses to review state judgments which can be supported on an adequate state ground even though a federal question may also have been involved. Accordingly, Justice Minton wrote the Court's opinion dismissing a writ of certiorari originally granted where it appeared "that the Supreme Court of Georgia might have rested its order on a non-federal ground. We are without jurisdiction when the question of the existence of an adequate state ground is debatable."[605]

603. 334 U.S. 1 (1948).
604. Barrows v. Jackson, 346 U.S. 249, 257-59 (1953).
605. Stembridge v. Georgia, 343 U.S. 541, 547-48 (1952); see Durley v. Mayo, 351 U.S. 277 (1956).

Sometimes, however, where it was not clear whether or not the state's judgment rested on a state ground, the Court took jurisdiction and remanded the case for a determination of that question. Justice Minton dissented in several such cases in which he thought it clear that the decision below was based upon a state ground. For example, he dissented from the Court's decision remanding an Illinois case to determine the basis for the Illinois court's decision denying post-conviction relief.[606] Similarly, he urged in dissent that another writ in an Ohio case should have been dismissed because even though the state court's opinion relied upon the fourteenth amendment, the syllabus to the opinion, which under Ohio law was the official decision of the court, relied upon a state ground.[607] And he likewise dissented from the Court's decision remanding a Georgia judgment refusing to grant a post-conviction motion for a new trial based upon discriminatory selection of the jury panel.[608] Justice Minton urged that it was clear that the decision rested on a state ground because the defendant had failed to challenge the jury panel at the outset as required by Georgia law. In his view:

> The promulgation of such a rule of law is, as we have pointed out, fair and reasonable and cannot be said to deny due process of law. Georgia has provided a reasonable time and manner in which the question could be raised. . . .
>
> This Court now says that the Georgia Supreme Court has the power to grant the petitioner's motion. I suppose that it has, but I would not think that it had denied a federal constitutional right if it did not change its rule. In fact, I think it would lead to absurd results if it changes its rule that the challenge to the array must be made at the threshold. The defendant, knowing of an error in the constitution of the array, could lay low and always have a built-in error on which he could rely if he did not like the results at the trial. Georgia is not bound to change its rule on penalty of a violation of the Federal Constitution. Avery v. Georgia, 345 U.S. 559, . . . does not decide this case because in that proceeding the challenge was timely made.
>
> We do not sit as a legal critic to indicate how we think courts should act. If a federal constitutional right is not presented, we have no duty to perform. There was no denial of equal protection of the law or of due process. This case was

606. Jennings v. Illinois, 342 U.S. 104 (1951).
607. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).
608. Williams v. Georgia, 349 U.S. 375 (1955).

disposed of by the Georgia Supreme Court altogether on state grounds. In such circumstances our duty is clear.[609]

One of the exceptions to the Court's appellate jurisdiction adopted by Congress pursuant to Article III of the Constitution is embodied in the statutory requirement limiting the Court's jurisdiction over state courts to "final" judgments.[610] Just as in other contexts, to Justice Minton final meant just that. Accordingly, he wrote the Court's opinion dismissing the writ of certiorari with respect to a temporary injunction against peaceful picketing.[611] Despite the attractiveness of the argument of the dissent that the temporary injunction might well break the strike if permitted to stand, Justice Minton and the Court seem clearly correct in concluding that: "It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that."[612]

Justice Minton's opinions in all of these cases demonstrate that he was extremely conscious of, and insistent upon adhering to, the constitutional and statutory limitations imposed on the Court's jurisdiction, regardless of resulting justice or injustice. His opinion in *Barrows v. Jackson* illustrates, however, that where the obstacle to the Court's deciding the case was within the Court's own discretion, he was sufficiently imaginative to surmount it in appropriate circumstances.

With respect to what is perhaps for practical purposes the most important procedural aspect of the Court's jurisdiction, the grounds upon which it grants certiorari, it is difficult to draw any conclusions as to his views because the individual votes of the justices are not normally recorded and written opinions are rare. The Court was severely criticized during Justice Minton's tenure for hearing too few cases,[613] while since his retirement it has been attacked from other quarters for hearing too many.[614] Since the most plausible explanation for this change in its

609. *Id.* at 406-07; *cf.* Black v. Cutter Laboratories, 351 U.S. 292 (1956); Poulos v. New Hampshire, 345 U.S. 395 (1953).

610. 28 U.S.C. § 1257 (1952).

611. Montgomery Building & Constr. Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952).

612. *Id.* at 181.

613. *E.g.*, Rodell, *Our Not So Supreme Court*, Look Magazine, July 31, 1951, p. 60; Frank, *The United States Supreme Court, 1949-50*, 18 U. CHI. L. REV. 1, 39 (1950); Harper and Rosenthal, *What The Supreme Court Did Not Do In The 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950).

614. See, *e.g.*, *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 85, 95-106 (1957).

certiorari policy lies in changes in the composition of the Court, it seems likely that Justice Minton adhered to the stricter view which prevailed while he was a member of the Court.

VII. SUMMARY AND CONCLUSIONS

In balancing the power of government against the freedom of individuals in doubtful cases, Justice Minton ordinarily voted to sustain the power of the majority to impose restrictions on individual liberty. He made it clear that in his view the Court's function in such cases is limited solely to the issue of power and does not extend to judging the wisdom of exercising that power. Similarly, he usually voted to sustain restrictions on procedural protections of those affected by the exercise of governmental power, consistently rejecting, for example, claims of procedural deficiencies by criminal defendants who made no claim to innocence. In related cases such as those involving entering aliens, alleged draft-dodgers and courts-martial defendants, he extended this position to the outer limits by upholding drastic limitations on the procedural protections of those affected.

Likewise, he consistently voted to sustain the exercises of state power against challenges based on the due process clause or on federal occupancy of the field. In common with the rest of the Court, he denied the existence of state power to discriminate on the basis of race or religion, but consistent with his other views with respect to the constitutional allocation of power and the necessity for judicial self-restraint, he refused to extend such decisions to what he regarded as private discrimination.

In interpreting statutes and other documents, he usually adhered to a literal interpretation, refusing to resort to "liberal construction," and ignoring the "gloss of history," where he thought no ambiguity existed. He placed little reliance on administrative interpretations, and he was careful to avoid treating a state's characterization as conclusive for purposes of interpreting a federal statute. In procedural matters he accorded considerable discretion on trial courts, and voted in favor of evidentiary rules which tend to bring about maximum development of the truth. Similarly, he recognized the existence of substantial discretion in administrative agencies in implementing federal legislation. Overall, he strove to maintain consistency in the Court's decisions.

It would be a mistake, however, to assume that Justice Minton (or any other Justice, for that matter) could dispose of any case by applying a set of generalities such as the foregoing without regard to its particular facts. Almost invariably Justice Minton's opinions commenced with a careful, concise statement of the pertinent facts, which were frequently

reiterated in his discussion of the legal issues. Most of his opinions were models of clarity, so that one usually had no doubt what he was deciding, however much one might disagree with his conclusions. Among his most important opinions were those which have been most severely criticized, such as *Rabinowitz, Knauff* and *Adler.* Equally essential to a fair evaluation of his contribution to the Court, however, were such opinions as *Barrows, Ramspeck, Norwood v. Kirkpatrick, Buck v. California,* and the *Phillips Petroleum* case.

So long as the Court continues to be the final arbiter of extremely difficult constitutional and other federal questions, it will always be subject to attack from one quarter or another. In Justice Minton's early years on the Court, the principal criticism came from those who thought the Court was not sufficiently sensitive to civil rights, and who often equated the political merits of legislation in this field with its constitutionality. Commencing with the decision in the *Segregation Cases,* the source of the attack shifted to those who urged that the Court was unduly interfering with the power of the states in our federal system. In law, as in politics (and, I suppose, most fields of endeavor), the most active and vocal comment usually comes from those who disagree, and criticism is often unrestrained. Frequently, disagreement with the Court's conclusions is not limited to intellectual differences, but is instead attributed to laziness, stupidity, or more sinister motives. For example, some of the Court's current critics have hinted that some of its recent decisions are Communist-inspired, although surely to any lawyer who has bothered to read and think about the Court's recent decisions involving alleged Communists, it must be clear that at worst they represent an overemphasis of civil liberties which is the antithesis of international Communism as it exists in the world today. Such criticism usually results from a failure to relate the Court's decision to the facts of the case (although in some instances the breadth of the Court's opinions has probably contributed to that failure). In this respect the current controversy over the Court's performance is no different from the attacks on the decisions of the "Truman Court."

I suppose that no one, with the possible exception of Justice Minton himself, would agree with his vote in every case in which he participated or with everything he wrote in his opinions. Intellectually or emotionally reasonable men may differ with the Court's reasoning and conclusion in a particular case, whether, for example, it be the position taken by Justice Minton in the *Adler* case or the strikingly different approach manifested by the majority in the *Konigsberg* case, both of which can be supported or attacked on intellectual grounds.

Justice Minton made perfectly plain his position with respect to these problems of power. That many disagree is not surprising in view of the importance of the conflicting considerations competing for supremacy. He was not a great justice in the sense of making a substantial contribution to the growth of the law. In his admirable desire to maintain consistency in the law, and his resulting heavy reliance on prior authority, he may have occasionally thwarted natural judicial developments justified by changing conditions in a dynamic world. Nevertheless, in his resolution of the problems of power, and in his recognition of limitations on the power of the Court itself, his overall performance was commendable. If he was not a Brandeis or a Holmes, neither, it is fair to say, were many of his critics, either on or off the Court.

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